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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DONYAE DWAYNE HALEY

on Habeas Corpus.

G053792

(Super. Ct. No. 04CF2000)

O P I N I O N

Original proceeding on a petition for a writ of habeas corpus after a judgment from the Superior Court of Orange County, Gary S. Paer, Judge. Petition granted.

William G. Holzer, under appointment by the Court of Appeal, for Petitioner.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Theodore M. Cropley and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Respondent.

This petition is unopposed. After it was filed in the California Supreme Court, the Supreme Court ordered respondent to show cause in this court why petitioner's convictions for active participation in a criminal street gang, aka street terrorism, should not be reversed. In its return to the petition, respondent concedes that because there is no evidence petitioner committed his crimes "with at least one other gang member" (*People v. Rodriguez* (2012) 55 Cal.4th 1125, 1134 (*Rodriguez*)) he is entitled to have his street terrorism convictions overturned. We therefore grant his petition.

DISCUSSION

The underlying facts of this case are set forth in our earlier opinion addressing petitioner's direct appeal. (See *People v. Haley* (June 21, 2006, G035002) [nonpub. opn.].) That opinion reflects petitioner was convicted of robbery and conspiracy to commit robbery for participating in one robbery and planning to commit another. In addition, the jury found true enhancement allegations the crimes were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b). Petitioner does not take issue with this aspect of the verdict, but there is more to the case than that.

The jury also convicted petitioner of two counts of street terrorism pursuant to Penal Code section 186.22, subdivision (a). That section makes it a crime to "actively participate[] in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and [] willfully promote[], further[], or assist[] in any felonious criminal conduct by members of that gang[]." Given that petitioner was an active gang member when he committed his crimes, and he committed them in association with other individuals, it is not surprising the prosecution charged him with two counts of street terrorism.

However, in *Rodriguez* our Supreme Court imposed an important limitation on that offense. After examining the wording and purpose of Penal Code section 186.22, subdivision (a), *Rodriguez* held the crime of street terrorism requires proof the defendant

committed felonious conduct “with at least one other gang member.” (*Rodriguez, supra*, 55 Cal.4th at p. 1134.) In so holding, *Rodriguez* made clear it is not enough that the defendant acted in concert with others in carrying out the subject crimes. Rather, Penal Code section 186.22, subdivision (a) only applies when the defendant’s crimes are committed collectively *with other gang members*. (*Id.* at pp. 1138-1139.)

Here, as the Attorney General concedes, there is no evidence petitioner’s criminal associates were gang members. Therefore, petitioner’s conduct did not constitute a crime under Penal Code section 186.22, subdivision (a), and his convictions for violating that section must be reversed. (See *People v. Mutch* (1971) 4 Cal.3d 389, 396 [habeas relief lies when the facts relating to defendant’s conviction are undisputed and the statute under which he was convicted did not prohibit his conduct].)

DISPOSITION

The petition for a writ of habeas corpus is granted, and petitioner’s convictions for street terrorism in counts 8 and 10 are reversed. Because petitioner was sentenced to concurrent terms on those counts, there is no need for resentencing. The clerk of the superior court is directed to prepare an amended abstract of judgment reflecting this disposition and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.